2002

State of Utah v. Everardo Gutierrez : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff-Appellee, v. EVERARDO GUTIERREZ, Defendant-Appellant.	Case No. 20020232-CA

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR DRIVING UNDER THE INFLUENCE, A THIRD DEGREE FELONY, IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, THE HONORABLE GARY D. STOTT PRESIDING

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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. EVERARDO GUTIERREZ, Defendant.	**RULING** Case No. 011402049 Judge Gary D. Stott

This matter came before the court on Defendant's Motion to Reconsider Dismissal of Enhancement of DUI Charge. The Court having reviewed the pleadings, makes and enters the following ruling.

STATEMENT OF FACTS

This court issued a ruling on October 29, 2001, denying Defendant's Motion to Dismiss Enhancement of the DUI charge. On October 11, 2001, Defendant submitted audio tapes of two of Defendant's guilty pleas and asked the court to listen to them to decide whether the pleas were voluntary. Subsequent to the hearing, Defendant submitted his written memorandum and only addressed his conviction in the Springville Justice Court. In response to Defendant's memorandum, the State argues that even without the Justice Court conviction, Defendant had three other convictions within the past ten years. Because Defendant had not addressed the issue of the other convictions in his memorandum, this court denied the motion without deciding on the voluntariness of the Justice Court conviction. Defendant now asks this court to reconsider its ruling of October 29,

2001, and has submitted transcripts of two of his guilty pleas. Because there was some confusion regarding the court's earlier ruling, the court will reconsider its previous ruling.

ANALYSIS

In May of 2001, Defendant was charged with DUI with Prior Convictions under U.C.A. §41-6-44(6)(a)(i) which reads in pertinent part:

> A conviction for a violation of Subsection (2) is a third degree felony if it is committed:
>
> (i) within ten years of two or more prior convictions under this section.

Defendant has four convictions for DUI or Alcohol Related Reckless Driving offenses within the last ten years. He pled guilty to Reckless Driving, Alcohol/Drug related in the Fourth District Court on February 7, 1994. He pled guilty to a DUI charge in the Fourth District Court on March 6, 1996. He pled guilty to a DUI charge in the Springville Justice Court on November 15, 1999, and finally, he pled guilty to a DUI charge in the Fourth District Court on November 29, 1999. Defendant concedes that his guilty plea entered on November 29, 1999, was knowing and voluntary. He challenges the other three convictions on the basis that he was not represented by counsel and that the trial courts did not comply with Rule 11 of the Utah Rules of Criminal Procedure as interpreted by the Utah Supreme Court in State v. Gibbons, 740 P.2d 1309 (1987).

Right to Counsel

The Utah Supreme Court has held that "an involuntary guilty plea cannot be used to enhance or support a subsequent conviction." State v. Branch, 743 P.2d 1187, 1192. A guilty plea entered

when a defendant is not represented by counsel and has not knowingly waived counsel is considered involuntary. State v. Triptow, 770 P.2d 146 (1989). The Supreme Court outlined the procedure for determining the voluntariness of a plea in Triptow:

> A previous judgment so proven is entitled to a presumption of regularity, including a presumption that the defendant was represented by counsel. This presumption satisfies any initial burden the State may have of proving that the defendant had or knowingly waived counsel. After proof of the previous conviction is introduced, the burden is on the defendant to raise the issue and produce some evidence that he or she was not represented by counsel and did not knowingly waive counsel. Once the defendant has presented some evidence, the presumption of regularity is rebutted and the burden shifts to the State to prove by a preponderance of the evidence that the defendant knowingly waived representation. Id. at 149.

Because the two issues are analyzed under different standards, we will first examine the three convictions to see whether Defendant was represented or knowingly waived counsel before considering the Rule 11 issue.

1994 Conviction in Fourth District Court

The transcript of the 1994 hearing shows that Defendant was represented by Rose Blakelock. Defendant attacks this plea on the basis that it did not comply with Rule 11, but it is clear that Defendant was represented by counsel as required by Triptow.

1996 Conviction in Fourth District Court

The State concedes, and the court agrees, that the guilty plea entered on March 6, 1996, was probably unconstitutional. Defendant was not represented by counsel and did not waive his right on the record.

1999 Conviction in Springville Justice Court

The State introduced evidence of a conviction entered in the Springville Justice Court in November of 1999. In order to meet his burden, Defendant must "proffer any *competent* evidence to rebut the presumption." Id. (emphasis added). The only evidence proffered by the Defendant is his affidavit. Defendant asserts that his plea was entered without the help of an attorney, that the judge did not advise him of his right to counsel, and that he signed some papers which he did not read. Defendant offers no other evidence that his plea was involuntary. To allow the presumption of validity to be overcome by a mere assertion would eviscerate the presumption completely. The "burden" placed upon a defendant to produce competent evidence would be no burden at all. This court finds that Defendant's affidavit is insufficient to overcome the presumption of regularity. In the absence of any other evidence of involuntariness, the court must find that Defendant's plea was knowing and voluntary.

Furthermore, even if Defendant's affidavit is enough to shift the burden, the court may take into account any evidence in the record that Defendant waived his right to counsel. While there is no transcript of the proceeding in the Justice Court, this court does have Defendant's signed statement that he "has read and understands the rights and procedures outlined below." The first item listed under the heading "Your Rights as the Accused" is the right to be represented by legal counsel at all court proceedings and consult with legal counsel before answering questions. Number two advises that if the defendant cannot afford counsel, he may apply for court appointed counsel. Therefore,

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff-Appellee, v. EVERARDO GUTIERREZ, Defendant-Appellant.	Case No. 20020232-CA

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from a conviction for driving under the influence with prior convictions, a third degree felony, in violation of Utah Code Ann. § 41-6-44 (Supp. 2001), in the Fourth Judicial District Court, Salt Lake County, the Honorable Gary D. Stott presiding. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2) (1996).

ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

Issue. A. Has defendant overcome the presumption that his counseled 1994 guilty plea was voluntary? B. Is a defendant's self-serving affidavit sufficient to rebut the presumption that his 1999 guilty plea was voluntary?

Standard of Review. Both these issues present questions of law reviewed for correctness. *James v. Galetka*, 965 P.2d 567, 570 (Utah App. 1998).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Resolution of this case does not require the interpretation of any rule or statute.

STATEMENT OF THE CASE

Defendant was charged by information with one count of driving under the influence of alcohol and/or drugs with prior convictions, a third degree felony, in violation of Utah Code Annotated § 41-6-44 (Supp. 2001); one count of driving on a suspended or revoked operator's license, a Class B misdemeanor, in violation of Utah Code Annotated § 53-3-227(3)(a) (1998); one count of giving false personal information to a peace officer, a Class C misdemeanor, in violation of Utah Code Annotated § 76-8-507 (1999); and one count of failure to operate a vehicle on the right side of a roadway, a Class C misdemeanor, in violation of Utah Code Annotated § 41-6-53 (1998). R. 1-2.

The DUI count was enhanced from a class B misdemeanor to a third degree felony based on defendant's prior DUI convictions. R. 105-107. Defendant filed a motion to dismiss the enhancement of the DUI charge, claiming his 1999 guilty plea was uncounseled and involuntary. R. 51-58. In denying defendant's motion, the trial court found that regardless of whether defendant's 1999 plea was voluntary, defendant's crime was still subject to the enhancement because he had been convicted of three other alcohol-related driving offenses within the past 10 years. R. 105-107.

Defendant renewed his motion, this time claiming error in three of his four previous guilty pleas. R. 111-27. He alleged that his 1994 plea was taken in violation of rule 11 because the court did not conduct an adequate colloquy at the plea hearing. R. 121-123. He asserted several errors at his 1996 plea hearing, including absence of counsel. R. 120-121.

He also re-alleged his claims that his 1999 plea was involuntary because he was not represented by an attorney and he was not advised of certain key rights. R. 119-120. The State conceded error in defendant's 1996 plea hearing. R. 202.

The trial court again denied defendant's motion. R. 199 (addendum A). It ruled that defendant's challenge to the 1994 plea was based on a technical violation and collateral attacks require more than a technical violation. R. 199-200. The court also found that the 1999 guilty plea should be upheld. Because there was no record to indicate if defendant had waived his rights and because defendant signed a statement explaining his rights, the court presumed the plea hearing was regularly conducted. R. 201. Defendant's affidavit asserting involuntariness was insufficient to rebut this presumption. R. 201.

Defendant entered a conditional guilty plea to driving under the influence of alcohol with prior convictions and to giving false personal information to a peace officer. R. 208-210, 221-222; 237:3-5.[1] As part of the conditional plea, defendant was "allowed to preserve his right of appeal in order to present his challenge to the State's use of prior convictions" to enhance his DUI conviction. R. 208-210. The remaining counts were dismissed. R. 208-210, 221-222; 237:3.

At sentencing, the statutory terms were suspended and defendant placed on probation for 36 months. R. 225-228. A fine of $1,850 was imposed for each count. R. 227. Defendant timely appealed. R. 230.

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[1] Defendant does not challenge his conviction for giving false personal information to a peace officer.

STATEMENT OF THE FACTS

This is defendant's fourth conviction for driving under the influence of alcohol or alcohol-related reckless driving.

Instant offense

On 7 May 2001, an American Fork police officer observed defendant's vehicle weaving and pulled him over. R. 191; 237:4-5. Defendant claimed he did not have his driver's license with him and gave the officer a false name. R. 190; 237:5. Because defendant smelled strongly of alcohol, the officer administered field sobriety tests, which defendant failed. R. 190; 237:5. Defendant's blood alcohol tested .207. R. 237:5.

Prior offenses

Defendant had at least four prior alcohol-related driving offenses.

(1) Fourth Circuit Court No. 935009703 (1994) (Alcohol-Related Reckless Driving). This conviction is at issue on appeal. The trial court found that defendant was represented by counsel and that his guilty plea was knowing and voluntary. R. 199, 202. Defendant attacks the latter finding on appeal. Br. Aplt. at 8-10.

(2) Fourth District Court No. 965000046 (1996) (Driving Under the Influence). This conviction is not at issue on appeal. The State conceded at trial, and the trial court agreed, that this guilty plea "was probably unconstitutional. Defendant was not represented by counsel and did not waive his right on the record." R. 202; *see also* R. 193. It may not be used to enhance the instant conviction.

(3) Springville Justice Court No. 98-1245 (1999) (Driving Under the Influence). This conviction is at issue on appeal. The trial court ruled that defendant's affidavit was insufficient to rebut the presumption of validity, and that in any event available evidence suggests that defendant knowingly and voluntarily waived his right to counsel. R. 201. Defendant attacks these rulings on appeal. *See* Br. Aplt. at 10-12.

(4) Fourth District Court No. 981406393 (2000) (Driving Under the Influence). This conviction is not at issue on appeal. Defendant does not contest the voluntariness of this plea. *See* R. 119.

SUMMARY OF ARGUMENT

The trial court properly found that defendant was subject to a sentence enhancement for his guilty plea to driving under the influence of alcohol because defendant had three prior DUI convictions based on voluntary and knowing guilty pleas. Defendant concedes one of these convictions may be used. The remaining two are at issue. If even one of these two was constitutionally entered, defendant's conviction must be affirmed.

1994. Defendant concedes he was represented by counsel at his 1994 guilty plea. The presence of counsel creates a presumption that the plea was entered voluntarily, absent some evidence to the contrary. Defendant presents no evidence to the contrary. This omission defeats his attack on the 1994 guilty plea, which is based solely on the court's failure to comply with the letter of rule 11.

1999. Defendant's 1999 guilty plea was also voluntary. This conviction is entitled to the presumption of regularity. Defendant attacks the conviction in a self-serving affidavit

claiming he did not understand his rights when he pled guilty. The trial court properly ruled this affidavit failed to rebut the presumption of regularity on the ground that accepting such unsubstantiated allegations would eviscerate the presumption of regularity. Moreover, although defendant was not represented by counsel, his voluntary waiver of this and other trial rights is reflected in two documents signed by defendant at the time of his plea. Thus, even if defendant's affidavit was sufficient to shift the burden back to the State, the record indicates that defendant's plea was in fact entered knowingly and voluntarily.

ARGUMENT

THE TRIAL COURT CORRECTLY RULED THAT DEFENDANT'S 1994 AND 1999 GUILTY PLEAS WERE KNOWING AND VOLUNTARY AND THUS PROPERLY USED TO ENHANCE DEFENDANT'S DUI CONVICTION

Defendant contends that "[t]he trial court's denial of his motion to reconsider dismissal of [the] enhancement of [his] DUI charge should be reversed as a matter of law." Br. Aplt. at 5.

Controlling law. To enhance a DUI conviction from a class B misdemeanor to a third degree felony, a court must find that the defendant has previously been convicted of driving under the influence of alcohol or drugs two or more times within 10 years of the current conviction. Utah Code Ann. § 41-6-44(2), (6) (Supp. 2001).

However, "an involuntary guilty plea cannot be used to enhance or support a subsequent conviction." *State v. Branch,* 743 P.2d 1187, 1192 (Utah 1987) (citing *Burgett v. Texas,* 389 U.S. 109 (1967)). Similarly, unless counsel was knowingly waived, an uncounseled prior

conviction may not be used to enhance a subsequent conviction. *State v. Triptow*, 770 P.2d 146, 147 (Utah 1989) (citing *Burgett*, 389 U.S. at 115). Although *Triptow* was an habitual criminal case, its reasoning applies to DUI enhancements. *State v. Pooler*, 2002 UT App 299, ¶ 5.

When the State relies on a prior conviction to enhance a present offense, "the State bears the burden of proving the prior conviction . . ." *Triptow*, 770 P.2d at 149. "A previous judgment of conviction so proven is entitled to a presumption of regularity, including a presumption that the defendant was represented by counsel. This presumption satisfies any initial burden the State may have of proving that the defendant had or knowingly waived counsel." *Id.* The burden then shifts to defendant: "After proof of the previous conviction is introduced, the burden is on the defendant to raise the issue and produce some evidence that he or she was not represented by counsel and did not knowingly waive counsel." *Id.* This showing shifts the burden back to the State: "Once the defendant has presented some evidence, the presumption of regularity is rebutted and the burden shifts to the State to prove by a preponderance of the evidence that the defendant was in fact represented or knowingly waived representation." *Id.*

The cases require only that the prior guilty plea was knowing and voluntary, not that the plea colloquy complied with rule 11, Utah Rules of Criminal Procedure. This is so because an attack on prior convictions in this context is "by definition" collateral: defendant seeks "to deprive them of their normal force and effect in a proceeding that [has] an independent purpose other than to overturn the prior judgments." *Parke v. Raley*, 506 U.S.

20, 30 (1992). When collaterally attacking a guilty plea (instead of mounting a direct appeal), a defendant "is entitled to relief only if the alleged violation of rule 11 is a also a violation of [defendant's] constitutional rights." *Salazar v. Warden*, 852 P.2d 988, 991 (Utah 1993). Not all rule 11 violations amount to constitutional violations. *See id.* A constitutional violation affects the knowing and voluntary nature of a plea. *See id.*

In seeking evidence of voluntariness in this context, the court is not limited to the plea colloquy. The presence of counsel, the plea affidavit, prior guilty pleas, and defendant's familiarity with the legal system may be considered in determining voluntariness. *See Parke,* 506 U.S. at 37.

Instant case. Defendant had four prior alcohol-related offenses. All were based on guilty pleas. Defendant conceded that his plea to a DUI charge in 2000 was voluntary. R. 119. The State conceded that his plea to a DUI charge in 1996 was uncounseled. R. 193. Thus, the trial court needed to find that only one of the remaining two guilty pleas was voluntary. It found that both were. This Court must affirm if the trial court was correct as to either of these two prior convictions.

A. The transcript of defendant's 1994 plea colloquy reinforces the presumption that his guilty plea was counseled and therefore voluntary.

Defendant conceded below that the State met its initial burden by producing certified judgments of convictions entitled to the "presumption of regularity." R. 123 (citing *Triptow,* 770 P.2d at 149). This showing shifted the burden to defendant to produce "some evidence" of lack of voluntariness before the burden shifted back to the State. *Id.*

Defendant concedes that he was represented by counsel when he pled guilty to alcohol-related reckless driving in 1994, but contends that the trial court "failed completely to comply with Rule 11(e)." Br. Aplt. at 7, 9. Defendant's concession is fatal to his claim.

Although a trial court may not rely on defense counsel's representations to satisfy the requirements of rule 11, "in the absence of any evidence demonstrating the pleas were involuntary," pleas entered with the benefit of counsel "are presumed to have been voluntary." *Branch*, 743 P.2d at 1192. *Accord Oppel v. Meacham,* 851 F.2d 34, 38 (2d Cir.) (holding plea voluntary where record shows counsel informed defendant of elements of crime), *cert. denied* 488 U.S. 911 (1988); *Worthen v. Meacham*, 842 F.2d 1179, 1183 (10th Cir. 1988) (applying presumption of voluntariness where defendant discussed plea with counsel and presented no counter evidence), *overruled on other grounds, Coleman v. Thompson*, 501 U.S. 722, 748-49 (1991); *Bonvillain v. Blackburn*, 780 F.2d 1248, 1250 (5th Cir. 1986) (holding that if record shows defense counsel explained nature of offense to accused, failure of trial judge to describe elements of offense does not make plea involuntary); *Trombley v. Anderson*, 584 F.2d 807, 809 (1978) (holding that petitioner's plea was entered knowingly where both petitioner "and his counsel represented to the court that they had discussed the charges and understood the nature of the charges, the consequences of a plea of guilty and the purpose of the hearing").

Thus, the United States Supreme Court has stated, "Normally the record contains either an explanation of the charge by the trial judge, or *at least a representation by defense counsel* that the nature of the offense has been explained to the accused." *Henderson v. Morgan*, 426

U.S. 637, 647 (1976) (emphasis added). In fact, "even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Id.*

Here, the record demonstrates that defendant was represented at his 1994 plea hearing and that both defendant and his counsel affirmed that counsel had explained defendant's right to him:

> [The court:] Ms. Blakelock[,] have you had an opportunity to advise Mr. Guttierez [sic] of his constitutional rights and that he will be waiving those upon entering his guilty plea this morning?
>
> [Defense counsel:] I have[,] Your Honor. Through the interpreter we have discussed that and he does understand, uh, the rights he waives when he pleads guilty this morning.
>
> [The court:] Is that true Mr. Guttierez [sic]?
>
> [Defendant:] Yes.

R. 114-15 (addendum B). In addition, the prosecutor proffered a detailed factual basis on the record. *See* R. 114.

Defendant may well be correct that his plea colloquy would not withstand a direct rule 11 challenge, but voluntariness, not compliance with rule 11, is the touchstone of a collateral challenge. *See Salazar*, 852 P.2d at 991. Absent evidence demonstrating lack of voluntariness, a plea entered with the benefit of counsel is "presumed to have been voluntary." *Branch*, 743 P.2d at 1192. Defendant here presented no evidence demonstrating lack of voluntariness; therefore, his 1994 plea must be presumed to have been voluntary.

The resulting conviction, together with his unchallenged 2000 guilty plea to driving under the influence, is sufficient to support his third degree felony conviction in the instant case. Defendant's conviction must therefore be affirmed.

B. Both the presumption of regularity and extrinsic evidence support the voluntariness of defendant's 1999 guilty plea.

In 1999, defendant pled guilty to driving under the influence of alcohol or drugs in the Springville Justice Court. R. 81. Defendant contends that he presented "some evidence" that this guilty plea was involuntary "since several Rule 11(e) rights were not explained to him nor was he asked to waive those rights." Br. Aplt. at 10.

Although no transcript of the guilty plea hearing exists, the proceeding is of course entitled to the presumption of regularity. *See Triptow*, 770 P.2d at 149. However, defendant claims to have rebutted the presumption of regularity. He relies solely on his affidavit, which asserts that the judge did not inform him of his right to counsel, that he was not offered the assistance of a public defender, that he did not read the papers he signed before pleading guilty, and that the judge did not explain his right to confront the witnesses against him or his right to call witnesses on his own behalf. R. 50 (addendum C).

The trial court ruled "that Defendant's affidavit [was] insufficient to overcome the presumption of regularity." R. 201. The court further ruled that, "even if Defendant's affidavit were sufficient to meet the burden of producing some competent evidence, the evidence in the record proves by a preponderance of the evidence the Defendant knowingly

waived his right to counsel." R. 200. Moreover, defendant was "unable to demonstrate that his constitutional rights were violated when he entered his guilty plea . . ." R. 199.

1. Defendant's affidavit was insufficient to overcome the presumption of regularity granted to the state.

Triptow holds that once the State has introduced a certified copy of a prior judgment of conviction, the burden shifts to defendant to produce "any competent evidence to rebut the presumption." 770 P.2d at 149. However, it does not hold that a defendant's unilateral assertion is sufficient to rebut the presumption.

The trial court ruled that defendant's affidavit was insufficient to rebut the presumption, pointing to the obvious reason: "To allow the presumption of validity to be overcome by a mere assertion would eviscerate the presumption completely. The 'burden' placed upon a defendant to produce competent evidence would be no burden at all." R. 201.

Many jurisdictions take a similar view. *See, e.g., Nash v. State*, 519 S.E.2d 893, 896 (Ga. 1999) ("the mere naked assertion by an accused that his prior counseled plea was not made knowingly and intelligently is insufficient" to rebut presumption that counseled plea was constitutional); *State v. Stewart*, 452 So. 2d 186, 194 (La. Ct. App. 1984) ("without proof to substantiate his claims" of error, defendant's assertion that he could not remember being advised of most of his rights at counseled guilty plea was insufficient to meet his burden of proof); *People v. Keller*, 604 N.Y.S.2d 461, 462 (N.Y. 1993) ("the unsupported assertions of defendant that . . . the court failed to explain the seriousness of the conviction or its consequences were insufficient to sustain defendant's burden of proving that the

predicate felony conviction was constitutionally infirm"); *State v. O'Neil*, 580 P.2d 495, 497 (N.M. Ct. App. 1978) ("allegations in defendant's motion . . . did not establish invalidity as a fact because the allegations were no more than unsupported claims" insufficient to show prior conviction was invalid); *Disheroon v. State*, 687 S.W.2d 332, 334 (Tex. Crim. App. 1985) ("appellant must show that he was without counsel by some evidentiary vehicle other than simply his own testimony. To hold otherwise would allow the mere assertions of a defendant to invalidate convictions obtained nearly twenty years ago"); *James v. Commonwealth*, 446 S.E.2d. 900, 904 (Va. Ct. App. 1994) ("the mere naked assertion by an accused that his prior counseled plea was not made knowingly and intelligently is insufficient").

Disheroon is instructive. When the State introduced prior convictions at sentencing, Disheroon challenged them. At an evidentiary hearing Disheroon testified that he had not been represented by counsel, was unaware he had a right to counsel, and did not affirmatively waive his right to counsel. 687 S.W.2d at 334. The trial court noted that at least one of the judgments was regular on its face and recited that Disheroon had appeared with counsel. *Id.*

The Texas Court of Criminal Appeals held that Disheroon's "testimony alone fails to meet the burden of showing indigency, lack of counsel and lack of waiver." *Id.* The court reaffirmed its position that "bald assertions by an accused that he was without counsel at his prior convictions are insufficient to overcome the presumption of regularity . . ." *Id.* (quoting *Maddox v. State*, 591 S.W.2d 898, 902 (Tex. Crim. App. 1979), *cert. denied* 447 U.S. 909 (1980)). In sum, a defendant "must show that he was without counsel by some evidentiary

vehicle other than simply his own testimony. To hold otherwise would allow the mere assertions of a defendant to invalidate convictions obtained nearly twenty years ago." *Id.*

This Court should adopt the reasoning of the trial court and the Texas Court of Criminal Appeals and hold that a defendant's own testimony, without more, is insufficient to rebut the presumption that a prior guilty plea was entered voluntarily and with the presence or waiver of counsel. This rule is consistent with *Triptow*. Indeed, the contrary rule would, as the trial court rightly observed, "eviscerate the presumption completely." R. 201.

2. Even if defendant's affidavit was sufficient to shift the burden of proof to the State, record evidence established that defendant voluntarily waived his right to counsel and voluntarily pled guilty.

Defendant contends that he "'did not have the help of an attorney,' . . . was not informed of his right to counsel," and was not explained his right to call witnesses in his favor or confront adverse witnesses at trial. Br. Aplt. at 11 (*quoting* R. 50, 51).

In considering a claim that a plea was entered knowingly and voluntarily, this Court "is not limited to the record of the plea hearing but may look at the surrounding facts and circumstances." *Salazar v. Warden*, 852 P.2d 988, 992 (Utah 1993). These include "a defendant's prior experience with the criminal justice system." *Parke*, 506 U.S. at 36-37 (noting that in pleading guilty in 1981, defendant "remained aware in 1981 of the rights of which he was advised in 1979").

Circumstances surrounding defendant's 1999 plea show that it was entered voluntarily and knowingly. Defendant had prior dealings with the criminal justice system. The record reflects that on at least two prior occasions, defendant had entered guilty pleas to similar

crimes. R. 111-127, 152-191, 197-204. In fact, defendant concedes that he was represented by counsel at his 1994 plea. R. 123. He does not explain how, having been represented by counsel in 1994, he was unaware of his right to counsel in 1999.

Second, defendant signed two documents in connection with his guilty plea. In a "Notification of Enhancement," defendant acknowledged that he understood his rights:

> 1. That prior to entering a plea I was advised of my constitutional rights by the court, and that I understand and waive those rights.
>
> 2. That I have been advised of the elements of the offense(s) to which I plead and the possible penalties.
>
> 3. That I understand that any future conviction of the same offense(s) will result in enhanced penalties, which penalties have been explained to me.
>
> 4. That my plea was made knowingly and voluntarily.

R. 178 (addendum D). This form was required of defendant specifically because his offense was "an Enhanceable Offense." R. 179.

In a second document titled "Springville Justice Court," defendant made the following acknowledgments:

> I certify that I have read and understand the rights and procedures outlined below. . . .
>
> 1. You may represent yourself in this court, but you also have the right, if you so choose, to be represented by legal counsel at all court proceedings and consult with legal counsel at all court proceedings and consult with counsel before answering questions.
>
> 2. If you desire counsel, and you cannot afford it, you may make application for court appointed counsel. . . .

3. In a court of law, you are not guilty until you plead or are proven guilty after a trial. . . .

4. You have the right to remain silent after you have made your plea.

5. You have the right to receive a formal information from the arresting officer filed under oath, and you have a right to have the charge and law explained to you in a manner you can understand.

6. You have the right to a jury trial on proper written request to the court. . . . For a trial, you may have the court subpoena any witnesses whom you wish to have testify. . . .

7. You have the right to remain silent at trial, this silence will not be construed by the court as an admission of guilty, for you have the privilege against compulsory self-incrimination.

8. You may take the witness stand yourself, if you wish, to testify in your own defense, after which you can be cross-examined by the prosecution.

9. You have the right to appeal if you are not satisfied with the finding after trial.

R. 180 (addendum E). The document informed defendant of the maximum penalties for each level of offense. R. 179. It also advised defendant to complete the form only if "you understand your rights and the court procedures as outlined above . . ." *Id.* Defendant completed the form. *See* R. 180.

Defendant claims not to have read these papers. R. 50. The State cannot force a defendant to read or listen to an explanation of his rights; but neither can a defendant ignore contemporaneous explanations of his rights and later claim his plea was unknowing.

Defendant claims that "[t]he judge did not explain to me that I had a right to have an attorney help me." *Id.* While this statement may be technically true, it does not establish that

defendant was unaware of his right to counsel. He acknowledged in writing that his right to counsel was explained to him and he had been represented by counsel in a prior, similar prosecution.

Defendant claims that "[t]he judge did not explain to me . . . that I had a right to call my own witness to testify for my benefit. *Id.* Again, while this assertion may be technically true, defendant acknowledged in writing that he knew he could "have the court subpoena any witnesses whom you wish to have testify." R. 180.

Finally, defendant claims that "[t]he judge did not explain to me that I had a right to confront the witness who would testify against me at trial . . ." R. 50. This right was not mentioned in the forms defendant signed.

Although confrontation of witnesses is one of three rights mentioned in *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), the failure to touch upon this one right will not alone render a guilty plea involuntary. *United States v. Guichard*, 779 F.2d 1139, 1142-43 (5th Cir.), *cert. denied* 475 U.S. 1127 (1986); *Lacy v. People*, 775 P.2d 1, 5 (Colo.), *cert. denied* 493 U.S. 944 (1989); Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 20.4(e) at 651 (1984). *Boykin* requires merely "that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." *Brady v. United States*, 397 U.S. 742, 747 n. 4 (1970). The record discloses that defendant did just that.

Thus, the trial court properly relied on the 1999 conviction, like the 1994 conviction, to enhance the instant conviction to a third degree felony.

CONCLUSION

The trial court's order should be affirmed.

RESPECTFULLY submitted on 9 October 2002.

MARK L. SHURTLEFF
Attorney General

J. FREDERIC VOROS, JR.
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellee were this 9 October 2002 mailed by first-class mail to the following:

MARGARET P. LINDSAY
Aldrich, Nelson, Weight & Esplin
43 East 200 North
P.O. Box "L"
Provo, Utah 84603-0200

Counsel for Appellant

Addenda

Addendum A

even if Defendant's affidavit is sufficient to meet the burden of producing some competent evidence, the evidence in the record proves by a preponderance of the evidence that Defendant knowingly waived his right to counsel.

Finally, Defendant also argues that the lack of an interpreter in the Springville Justice Court is additional evidence that his plea was involuntary. On December 13, 2001, Defendant appeared before this court without the assistance of an interpreter. Somehow he was perfectly able to understand and respond to questions asked by this court about being released on his own recognizance. Absent any evidence that Defendant needed, asked for, or was denied the assistance of an interpreter in the Justice Court proceeding, the court finds that his guilty plea was knowing and voluntary.

Compliance with Rule 11

Defendant next argues that his guilty pleas were not knowing and voluntary because the trial courts failed to comply with the requirements of Rule 11. A successful collateral attack of a plea requires a defendant to prove more than just a technical violation of Rule 11. In footnote six of their opinion in Salazar v. Warden, 852 P.2d 988, 991 (1993), the Utah Supreme Court stated that:

> We stress that we are not retreating from our holding in State v. Gibbons, 740 P.2d 1309 (Utah 1987), restated in State v. Maguire, 830 P.2d 216, 217 (Utah 1992), that the trial court must strictly comply with rule 11. If this were a direct appeal from denial of a motion to withdraw a guilty plea, for example, failure to strictly comply with the rule would be grounds for reversal. We merely hold that on collateral attack of a conviction, the petitioner must show a constitutional violation to obtain relief.

The Supreme Court explained further that:

> Rule 11 is designed to protect these rights by ensuring that the defendant receives full notice of the charges, the elements, how the defendant's conduct amounts to a crime, the consequences of the plea, etc. However, compliance with rule 11 is not constitutionally required. Id.
>
> Thus, a failure to comply with Utah's rule 11 in taking a guilty plea does not in itself amount to a violation of a defendant's rights under either the Utah or the United States Constitution. Id.

Defendant attacks his 1994 conviction based on technical violations of Rule 11. The record shows that Defendant was represented by Ms. Blakelock and that Ms. Blakelock discussed with Defendant the rights he was waiving by pleading guilty. When asked if it was true that his rights had been discussed with him, Defendant replied, "Yes." Because Defendant has failed to show that his constitutional rights were violated when he entered his guilty pleas, the court finds that his pleas were knowing and voluntary.

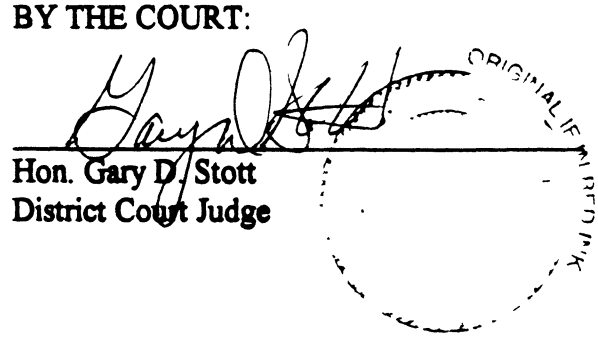
The court also finds that because Defendant is unable to demonstrate that his constitutional rights were violated when he entered his guilty plea in the Justice Court, his plea was knowing and voluntary.

CONCLUSION

In conclusion, for the reasons stated above, Defendant's Motion to Dismiss the Enhancement is denied.

DATED this 19 day of December, 2001

BY THE COURT:



Hon. Gary D. Stott
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 011402049 by the method and on the date specified.

METHOD	NAME
By Hand	STATE OF UTAH
By Hand	JARED ELDRIDGE

Dated this 19th day of December, 2001.

Ryan V. Wood
Deputy Court Clerk

Addendum B

1994 Hearing
R: Mr. Romney
J: Judge
B: Ms. Blakelock
I: Interpreter

R: Your Honor could you call the matter of Everado Guttierez?
J: Yes.
R: Thank you. I talked with Ms. Blakelock who is his attorney, and uh, we have it, uh resolved. If accepted by the court it would be this, the Defendant would plead guilty, the State would move to amend the charge to alcohol related reckless driving. The pla...the Defendant would plead guilty to that, the city would recommend and uh, the Defendant would not oppose two days jail as part of the sentence to be imposed. That's it, correct?
B: Uh, we have an interpreter, if Mr. Guttierez didn't understand...
R: Oh.
B: ...that I would like...
(swearing in...)
J: Did you understand what Mr. Romney said or would you like to have him repeat it?
I: Could you please repeat that?
J: Mr. Romney I'm sorry...
R: Oh yes Your Honor I certainly could. The Defendant would be pleading guilty to an amended charge of alcohol related reckless driving. The City would recommend and the Defendant would not oppose two days jail as, as part, part of the punishment imposed. Two days remaining to be served...and a fine appropriate as the court would see fit.
J: Is the recommendation...
R: It was...Your Honor...
J: ...first offense DUI?
R: Well, first offense in the now current time period since April 23, 1990. In addition Your Honor, the Defendant...it was in a parking lot, not in a street and the Defendant was backing a car up or something of that sort so...there are a couple of factors...uh...
J: I guess what I'm asking is the agreement to impose the fine, the classes, the surcharge...
R: Yeah...treat it...
J: ...as if it were a first...
R: Yeah as if it were a first offense DUI.. Yes sir.
J: I assumed that from the two day jail time...
R: Yes Your Honor.
B: Um, Your Honor I would also like to let you know that my client has signed up already for these classes. I have documentation of that and uh, has paid the charge for those classes and will be taking his first class February 15.
R: Yeah, we, we also appreciate that, Your Honor, he's already started to make some efforts that way.
J: Ms. Blakelock have you had an opportunity to advise Mr. Guttierez of his constitutional rights and that he will be waiving those upon entering his guilty plea this morning?
B: I have Your Honor. Through the interpreter we have discussed that and he does understand, uh, the rights he waived when he pleads guilty this morning.

J: Is that true Mr. Guttierez?
I: Yes.
J: Therefore based on the cities motion to amend the information to alcohol related reckless driving, as to that offense, a Class B Misdemeanor what is your plea?
(Inaudible talking)
I: Yes.
J: Guilty or not guilty?
I:Guilty
J: Mr. Romney, do you have a factual basis...you told me earlier...
R: Yes Your Honor let me pull that out. Um...it would be this (papers rustle) Def...the officers patrolling the Latino dance at the Meridian school observed the vehicle move from one parking place to another, stop and two individuals get out. The driver appeared by the officers observations to be under the influence of alcohol. He did have a strong odor of an alcoholic beverage on his person or breath. He did not perform satisfactorily on several field sobriety tests and took and intoxilizer test, the results of which were above .08 and he was arrested for a DUI.
J: All right, the court will accept the plea. Mr. Guttierez you have a right to be sentenced not less than two and no more than thirty days from today's date. That's to prevent the court from sentencing you..(coughing in background)...or too long after you're convicted. Do you understand that?
(Talking in background)
I: That's fine.
J: Do you request that the Judge sentence you today and waive the two day restriction?
I: Today.
J: Is there anything you would like to say Ms. Blakelock on behalf of the client? Other than what's been represented...
B: Uh...Just that he um, really is committed to not re-offending and he understands the gravity of what he did and that he wasn't on the street, he just was driving from one parking spot to another. And he did have a designated driver.
J: And this is his first offense? (Pause) Is there anything Mr. Guttierez would like to tell the court?
I: (inaudible)
J: All right. Therefore it will be the judgement and the sentence of the court for the offense of alcohol related reckless driving, a Class B Misdemeanor, that you be sentenced to six months in the Utah County Jail and pay a fine of $1,000. The court will stay the imposition of the fine and the sentence and place you on probation under the following terms and conditions, for twelve months...
(inaudible)
J: With the court. One, that you serve two days in the Utah County Jail. Two, that you pay a fine of $300. In addition, that you pay a $255 surcharge and $155 to the Alcohol Education Fund, for a total of $705 in fees and fines. How much time are you going to need to pay those?
B: Um, could he be given credit for the, I think it was an $80 charge that he had for the substance abuse class I signed him up for?
J: Yes.
(Ms. Blakelock speaks to Mr. Guttierez, inaudible)
B: Ok, he'll, he can afford to like, he's going to try to pay it off quickly but I don't want to over

burden him. Can he have um, maybe $150 a month and then if he pays it off a lot sooner?
J: Yeah, that's fine. $150 a month until paid in full will be the order. Now he needs to report...well, what is the course he signed up for?
B: It's uh...(inaudible)..through the Utah County Substance Abuse...
J: He's required as a condition of court probation to continue with the classes and the recommended treatment and therapy as described in the report from the Utah County Department of Substance Abuse, comply with all the treatment and recommendations contained therein. Now, last but not least...when is he going to complete the two day jail sentence?
(Inaudible)
I: This week too.
J: All right, that will be the order. Thank you.

.....

1996 Hearing

J: Judge
I: Interpreter
P: Prosecutor
C: Judge's clerk

J: ...is the case of Provo City vs. Everado Gutt, Guttierez. Everado Guttierez.
I: Hello.
J: Mr. Guttierez I'm handing you an information that charges you with the offense of driving under the influence...(inaudible)
I: Guilty.
J: Ok, I was just...let me ask the question first. To that offense how do you plead?
I: Guilty.
J: All right, is there anything you'd like to tell the court?
I: No.
J: Do you have prior offenses?
I: Problems with the law?
J: Yes.
I: Yes.
J: What are those?
I: A DUI.
J: A DUI other than this one?
I: Not exactly.
J: Explain yourself.
I: Alcohol related.
J: Ok.
P: Your Honor, that would make this a second, we, we, I think, well, I think we'd recommend a referral under the circumstances on a second offense DUI.
J: I'll accept your recommendation. I need you, you have the right to be sentenced within 45 days from the date that the offense occurred. I want to refer this to Adult Probation and Parole for a report. In order to do that I need you to waive your right to be sentenced within 45days. Are you willing to waive that right?

I: I don't know, could you explain it a little better?
J: Yes, in the event that you fail to waive the right I can impose jail time of up to six months. I'm inclined to impose substantial jail time unless I get a report from AP&P which will more clearly define what will be a more appropriate remedy. However to do that I would need your waiver of your right to be sentenced within 45 days. Are you willing to do that?
I: Yes.
J: All right, that waiver being in place I'll go ahead and refer this matter to AP&P for a pre-sentence report investigation. We'll set this matter for sentencing. The court clerk will give you a date for sentencing.
C: March 11, at 10:00 a.m.
J: All right, you'll need to be back here then.

.....

1996 Hearing/sentencing
J: Judge
I: Interpreter
G: Everado Guttierez
P: Prosecutor
F: Female voice

J: Next is Everado Guttierez. Do you need an interpreter as well sir?
G: Yeah.
J: Ok.. Have you read your report from Adult Probation and Parole?
I: Yes.
J: Very well, is there anything you'd like to tell me before I pronounce sentence?
G: No.
I: No.
J: Does counsel wish to be heard in this matter?
P: Your Honor we show this is the second DUI and we would go with the agencies recommendation.
J: All right. I'm going to sentence this Defendant to serve six months in the Utah County Jail. I'm going to place the Defendant on probation with Adult Probation and Parole for a period of 12 months with the following conditions: I'm going to require that you serve, I'm going to suspend all but ten days of that sentence and require that you serve 10 days in the Utah County Jail with work release. You are to check in, you are to contact the jail immediately and you are to check in with the jail to start serving that time within two weeks of today's date. You are to pay a fine in this matter in the amount of $500. You are to pay a surcharge...what's 85% of that...in the amount of $425. You are to abstain from the use of alcohol while on probation and be subject to alcohol testing. You are to pay $150 to the Alcohol Education Fund. You are to have an evaluation performed within two weeks of today's date by the Utah County Department of Substance Abuse, and undergo such therapy and treatment as they are rec...as are recommended by the Utah County Department of Substance Abuse or your probation, uh officer. The terms of repayment of the fine will be as set, by the Adult Probation and Parole people. Do you understand your sentence?
I: Yes.

Addendum C

JARED W. ELDRIDGE (#8176)
UTAH COUNTY PUBLIC DEFENDER ASSOC.
Attorney for Defendant
245 North University Ave.
Provo, Utah 84601
Telephone: (801) 379-2570

IN THE FOURTH JUDICIAL DISTRICT COURT, STATE OF UTAH,

UTAH COUNTY, PROVO DEPARTMENT

STATE OF UTAH Plaintiff, v. EVERARDO GUTIERREZ, Defendant.	**AFFIDAVIT** Case No. 011402049 JUDGE GARY D. STOTT

STATE OF UTAH)
ss.
COUNTY OF UTAH)

I, EVERARDO GUTIERREZ, being first duly sworn depose and state as follows:

1. My name is EVERARDO GUTIERREZ. I am the Defendant in the above entitled case.

2. I attest that on or about November 15, 1999 in the Springville Justice Court I entered a guilty plea for Driving Under the Influence of Alcohol.

3. When I entered my guilty plea I did not have the help of an attorney.

4. The judge did not explain to me that I had a right to have an attorney help me.

5. I was not offered the assistance of a public defender.

6. At the time I entered my guilty plea, I signed some papers.

7. I did not read these papers before I signed them nor did anybody read or explain the papers to me.

8. The judge did not explain to me that I had a right to confront the witness who would testify against me at a trial or that I had a right to call my own witness to testify for my benefit.

9. The judge ordered a jail term of approximately 56 days as part of my sentence.

10. I attest that all of the foregoing statements are true and accurate to the best of my knowledge.

DATED this 10 day of July, 2001.

Everardo Gutierrez, Affiant

Everardo Gutierrez, being duly sworn says: That he is the person who executed the foregoing instrument; that he has read the same and knows the contents thereof; that the matters stated therein are true of his own knowledge, except such matters as stated to be upon information and belief, and as to those matters he believes them to be true.

Everardo Gutierrez, Affiant

STATE OF UTAH)

ss.

COUNTY OF UTAH)

On the 10 day of July, 2001, personally appeared before me Everardo Gutierrez, the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

DATED this 10 day of July, 2001.

RONDA L. GODARD
NOTARY PUBLIC • STATE of UTAH
245 N. UNIVERSITY
PROVO, UT 84601
COMM. EXP 10-16-2004

Addendum D

IN THE JUSTICE COURT IN AND FOR SPRINGVILLE CITY
UTAH COUNTY, STATE OF UTAH
50 SOUTH MAIN STREET, SPRINGVILLE UTAH 84663 * 801-489-2707
Before Honorable Dean F. Olsen, Justice Court Judge

STATE OF UTAH PLAINTIFF	:	NOTIFICATION OF ENHANCEMENT
VS.	:	
EVERARDO M. GUTIERREZ 1050 S 500 W LEHI UT 84043 DEFENDANT	:	DOCKET NO: 98-1245

The above named defendant, EVERARDO M. GUTIERREZ,

date of birth: 10-29-69, hereby appears either in person or through counsel and acknowledges the following:

1. That by my guilty plea the court has made a finding of guilt with respect to the charge(s) of:

   D.U.I. OF ALCOHOL OR DRUGS
   WARRANT IN AIDE OF COMMITMENT

2. That prior to entering a plea I was advised of my constitutional rights by the court, and that I understand and waive those rights.

3. That I have been advised of the elements of the offense(s) to which I plead and the possible penalties.

4. That I understand that any future conviction of the same offense(s) will result in enhanced penalties, which penalties have been explained to me.

5. That my plea was made knowingly and voluntarily.

DATED: 11-15-99 BY: Everardo Gutierrez
Defendants signature

SPRINGVILLE JUSTICE COURT

50 SOUTH MAIN STREET * SPRINGVILLE UTAH 84663 * 489-2707

JUDGES COURT HOURS: Monday: 9:00 a.m. to 11:30 a.m. AND Tuesday: 1-5 ~~1:00 p.m. to 6:00~~ p.m.
CLERKS HOURS: For payments: 8:00 a.m. to 4:30 p.m. daily, Closed noon to 1:00 p.m.

SPRINGVILLE CITY

vs Everardo Gutierrez
DEFENDANT

JUDGMENT & SENTENCE

Docket or Citation #: 98-1245

____ Current address has been verified with defendant: 1050 S. 500 (e) Lehi 84043 768-8681
____ Forfeit bail / bond.
X Defendant given copy of information and advised of rights.
X Informaton read.
____ Penalties explained. X Defendant acknowledges (s)he understands rights, charge(s), penalties.
____ Case continued to - Date : ____ Time: ____ ____ m. for entry of a plea.

CHARGE(S): #1: DUI (Guilty) / Not Guilty / No Contest / Dismissed
#2: ____ Guilty / Not Guilty / No Contest / Dismissed
#3: ____ Guilty / Not Guilty / No Contest / Dismissed
#4: ____ Guilty / Not Guilty / No Contest / Dismissed

____ Defendant waived time for imposition of sentence.
____ Case continued to - Date: ____ Time: ____ .m. for imposition of sentence.
____ Case set for trial / pretrial - Date: ____ Time: ____

SENTENCE:

#1: Fine $1550.00 & ____ days jail. $____ of fine & ____ jail suspend. on cond. of probation / fine pay
#2: Fine $____ & ____ days jail. $____ of fine & ____ jail suspend. on cond. of probation / fine pay
#3: Fine $____ & ____ days jail. $____ of fine & ____ jail suspend. on cond. of probation / fine pay
#4: Fine $____ & ____ days jail. $____ of fine & ____ jail suspend. on cond. of probation / fine pay

TOTAL FINE: $1,550.00

____ Fine to be paid on or before ____. Payment schedule: ____ month, begin ____
X Defendant to be on probation for 12 months with this court.
Conditions of probation: 1. No similar charges.
2. Notify the court of any change in address.
3. ____
4. ____
____ Defendant to report to - Utah County Division of Human Services for an evaluation / treatment.
____ REAPPEAR or REVIEW date: ____ at ____ ____ m .
____ Defendant may serve ____ hours community service in lieu of jail or fine by: ____
X COMMITMENT to be issued for $1,550.00 OR 56 days jail.
(Upon Sentencing) Let Mom in jail 6 days. Give $35 credit for 1 day

DATE: 1-5-00

Dean F. Olsen
JUSTICE COURT JUDGE

Addendum E

SPRINGVILLE JUSTICE COURT

50 SOUTH MAIN STREET * SPRINGVILLE UTAH 84663 * (801) 489-2707 * FAX (801) 491-7815

Please read the following information, both sides. When you have finished please fill out the information requested below and return the form to the clerk. You will be given a copy before you leave the courtroom

ACKNOWLEDGMENT: I certify that I have read and understand the rights and procedures outlined below

EVERARDO GUTIERREZ Print your name	528-85-6996 Social Security Number
1050 S. 500 W. Street Address & Post Office Box	 Place of employment
LEHI UT 84043 City State, Zip Code	11-15-99 Today's date
768-8681 Home Telephone Work Telephone	Everardo Gutierrez Your Signature

COURTROOM PROCEDURES

You are here on arraignment to answer an information/citation issued against you by an officer of the law When your name is called please step forward to the podium. You will be required to enter a plea. You must enter one of the following pleas to each offense with which you are charged:

1. Guilty - If you plead guilty you may make a statement prior to being sentenced by the Court, if you enter a guilty plea you are waiving your right to a speedy trial.
2. No Contest - Admission to charge, you must obtain permission from the Judge to enter this plea.
3. Not Guilty - You reserve your statements for the date of trial, which will be set at a later date You may be required to post bail or remain in jail until the trial date. If you lose your case, you must be prepared to pay the fine on trial day

YOUR RIGHTS AS THE ACCUSED (Defendant)

1. You may represent yourself in this court, but you also have the right, if you so choose, to be represented by legal counsel at all court proceedings and consult with legal counsel before answering questions.
2. If you desire counsel, and you can not afford it, you may make application for court appointed counsel. To qualify for this, you must be able to prove indigence, you will be required to fill out a form as to your financial status and swear that it is true and correct.
3. In a court of law, you are not guilty until you plead or are proven guilty after a trial. You have a right to fair and impartial trial before the court.
4. You have the right to remain silent after you have made your plea.
5. You have the right to receive a formal information from the arresting officer filed under oath, and you have a right to have the charge and law explained to you in a manner you can understand.
6. You have a right to a jury trial on proper written request to the court. You must file a written demand to the court no later than ten (10) days prior to the court date set for trial. For a trial, you may have the court subpoena any witnesses whom you wish to have testify. If you are found not guilty after a trial, you will receive no fine and will be absolved, and, if cash bail has been posted, it will be returned to you
7. You have the right to remain silent at trial, this silence will not be construed by the court as an admission of guilt, for you have the privilege against compulsory self-incrimination.
8. You may take the witness stand yourself, if you wish, to testify in your own defense, after which you can be cross-examined by the prosecution.
9. You have the right to appeal if you are not satisfied with the finding after trial.

White Copy - Court Yellow Copy - Defendant

FINES AND PENALTIES

You are advised that the maximum penalties prescribed by law for each class of offense is listed below:

a. Class B Misdemeanor - $1,850.00 fine and/or one hundred eighty (180) days jail.
b Class C Misdemeanor - $1,387.00 fine and/or ninety (90) days jail.
c Infraction - $925 00 and no jail imposed.

Fines and penalties are based on bail schedules developed by the Utah Judicial Council which is the governing body for all courts in Utah. These fines also include surcharge amounts imposed by the 1991 Utah Legislature Fines levied by this court are not arbitrarily arrived at by the court, but have their basis in statutory law If such fines are seen to be excessive, be advised that this court is following fine guidelines imposed by higher authority.

ENHANCEABLE OFFENSES

Some offenses are Enhanceable Offenses which means that if you are arrested again for the same offense it could be charged as a Class A instead of a Class B Misdemeanor or that the fine could be substantially increased. If your offense is an Enhanceable Offense you will be asked to sign a document which states the following:

1. That prior to entering a plea you were advised of your constitutional rights, that you understand and waive those rights.
2. You have been advised of the elements of the offense(s) and possible enhanced penalties of the offense.
3. That your plea was made knowingly and voluntarily.

Enhanceable offenses include: DUI, reckless driving, theft, possession of a controlled substance, no insurance, no proof of insurance, domestic violence assault, assault, failure to stop for a school bus, speeding in a school zone and sale of tobacco to a minor.

CONSEQUENCES OF FAILURE TO APPEAR OR PAY

Failure to appear or failure to pay will result in a warrant for arrest. When a warrant is issued, the defendant's drivers license is suspended by Drivers License Division. No notice of this suspension is sent to the defendant by the court. After this happens, a compliance form will be required by Drivers License Division to reinstate the license.

Please keep the court notified of your current address as long as your case is still active with the court. The court will send all legal notices to your last reported address by regular U.S. Mail. You are required to be present for all court appearances as notified by the court. If you fail to appear when notified, a warrant for your arrest will be issued. Please be aware that it is your responsibility to notify the court personally by telephone or mail of your change of address. Do not rely on the Post Office, Police, your family, etc. to notify the court of a change of address. You must report a change of address to the court.

If you understand your rights and the court procedures as outlined above, fill out the requested information on the front of this form, and return it to the clerk when your name is called. A copy will be given to you before you leave the courtroom.